

DISTRICT OF NEVADA

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UNITED STATES OF AMERICA

Plaintiff,

2:03-cr-0350-LRH-LRL

V.

ORDER

TORRES HYMON,

Defendant.

Before the court are defendant Torres Hymon’s (“Hymon”) motion for reduction in sentence pursuant to 18 U.S.C. § 3582 (Doc. #1334¹) and motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (Doc. #1337).

I. Facts and Procedural History

On March 1, 2005, Hyman pled guilty to conspiracy to engage in a racketeer influenced corrupt organization in violation of 18 U.S.C. § 1962(d). Doc. #586. Hyman was subsequently sentenced to eighty-seven (87) months incarceration. Doc. #815. Thereafter, Hyman filed the present motions for reduction in sentence (Doc. #1334) and to vacate, set aside, or correct his sentence (Doc. #1337).

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¹ Refers to the court's docket number.

1 **II. Motion for Reduction in Sentence (Doc. #1334)**

2 Pursuant to 18 U.S.C. § 3582, a court may modify or reduce a petitioner’s sentence if there
3 has a been a post-sentencing reduction in the applicable sentencing guidelines for the underlying
4 crime. 18 U.S.C. § 3582(c)(2). However, in order to modify a petitioner’s sentence, the petitioner
5 must establish that: (1) he was sentenced to a term of imprisonment based on a sentencing range
6 that was subsequently lowered by the Sentencing Commission, and (2) the reduction in sentence
7 must be consistent with the Sentencing Commission’s applicable policy statements. *United States*
8 *v. Morales*, 590 F.3d 1049, 1051 (9th Cir. 2010).

9 Here, the court has reviewed the documents and pleadings on file in this matter and finds
10 that Hymon has failed to meet his burden to establish that the applicable sentencing guideline range
11 related to his conviction was lowered. Nowhere in his motion does he identify any change in the
12 sentencing guidelines for conspiracy to engage in a racketeer influenced corrupt organization in
13 violation of 18 U.S.C. § 1962(d). Thus, Hymon fails to meet his burden to show that he is entitled
14 to a reduction in sentence and the court shall deny his motion accordingly.

15 **III. Motion to Vacate, Set Aside, or Correct Sentence (Doc. #1337)**

16 Pursuant to 28 U.S.C. § 2255, a prisoner may move the court to vacate, set aside, or correct
17 a sentence if “the sentence was imposed in violation of the Constitution or laws of the United
18 States, or that the court was without jurisdiction to impose such sentence, or that the sentence was
19 in excess of the maximum authorized by law, or is otherwise subject to collateral attack.”
20 28 U.S.C. § 2255; 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and*
21 *Procedure* § 41.3b (5th ed. 2005).

22 In his motion for relief under § 2255, Hymon argues that his counsel was constitutionally
23 ineffective at sentencing because his counsel failed to object to a four (4) point enhancement for
24 being an organizer or leader of the criminal enterprise. *See* Doc. #1337.

25 The Sixth Amendment to the Constitution provides that criminal defendants “shall enjoy
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1 the right to have the assistance of counsel for his defense.” U.S. Const. Amend. VI. To establish
2 ineffective assistance of counsel, a petitioner must show that his counsel’s performance was
3 deficient, and that petitioner was prejudiced as a result of counsel’s deficient performance.
4 *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In determining whether counsel’s performance
5 was deficient, the court must examine counsel’s overall performance, both before and at trial, and
6 must be highly deferential to the attorney’s judgments.” *Quintero-Barraza*, 78 F.3d at 1348 (citing
7 *Strickland*, 466 U.S. at 688-89) (internal quotations omitted). Once a petitioner has established that
8 counsel’s performance was deficient, the petitioner “must then establish that there is a reasonable
9 probability that, but for counsel’s unprofessional errors, the result of the proceeding would have
10 been different. A reasonable probability is a probability sufficient to undermine confidence in the
11 outcome.” *Id.*

12 After reviewing the documents and pleadings on file in this matter, the court finds that
13 Hymon has failed to establish that his counsel’s performance was constitutionally ineffective.
14 Hymon fails to provide any basis for his claim that he was not an organizer of the criminal
15 enterprise and therefore not entitled to the four (4) point enhancement. Rather, Hymon simply
16 argues that counsel should have objected to this enhancement but fails to identify on which grounds
17 his counsel could have objected or that such an objection would have been sustained in light of his
18 acknowledgment in both the plea agreement and the plea hearing that he was a leader in the
19 underlying criminal activity and that such evidence could be used in his sentencing determination.
20 Thus, Hymon has failed to establish that his claim for ineffective assistance of counsel is anything
21 but frivolous. Accordingly, the court shall deny his motion to vacate, set aside, or correct sentence.

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1 IT IS THEREFORE ORDERED that defendant's motion for reduction in sentence
2 (Doc. #1334) and motion to vacate or correct sentence pursuant to 28 U.S.C. § 2255 (Doc. #1337)
3 are DENIED.

4 IT IS SO ORDERED.

5 DATED this 26th day of September, 2011.



LARRY R. HICKS
UNITED STATES DISTRICT JUDGE